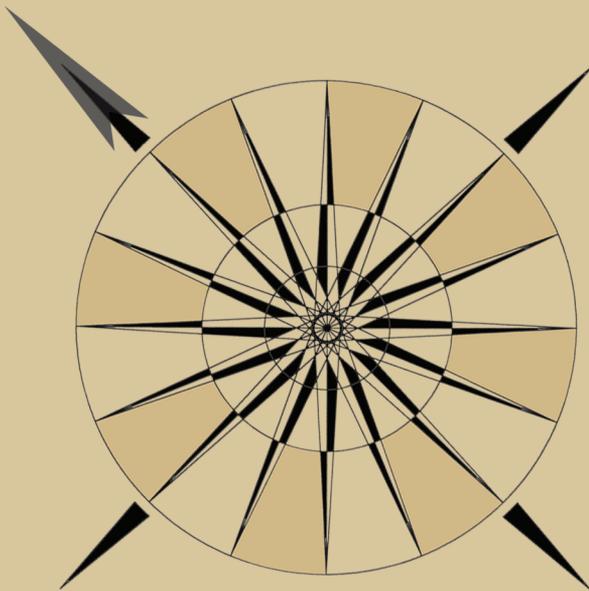


THE FORGOTTEN LINCHPIN
in the case for
STATEHOOD EQUALITY



*An Analysis of The Northwest Ordinance of 1787
with Respect to Federally Controlled Lands*



by
BILL HOWELL

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by
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Hurricane, Utah

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*“If you wish to converse with me,
define your terms.” —Voltaire*

STIPULATIONS

The text in this booklet is written in the vernacular commonly used in the present time when speaking of either federal territorial or public lands. The particular terms at issue, and their meaning as intended in this booklet, are stipulated to as follows:

The terms “*federal territory or territories*” and “*federal territorial land or lands*,” are intended to mean or refer to lands acquired by the United States either by cession of an original state or from a foreign sovereign and which are held for the benefit of the whole people and “*in trust for the several states to be ultimately created out of [them]*.” *Shively v. Bowlby*, 152 U.S. 1 (1894).

The terms “*public land or lands*” are intended to mean or refer to federal territory or federal territorial land that is encompassed within the borders of respective states.

The terms “*trust or federal trust*” are intended to mean or refer to the duty of Congress under Article IV, sec. 3, clause 2 of the Constitution for the United States of America, which duty is in two parts including: 1. establish new states out of federal territories and admit such states into the Union of states upon an equal footing with the original states as to political rights and as to sovereignty and, 2. extinguish the federal title in and dispose of all federal territorial and public lands.

The term “*United States*” is intended to mean or refer to the trustee possessing responsibility for full execution of the federal trust respecting federal territorial and public lands.

The term “*proprietor*” is intended to mean or refer to “*a person who has the temporary but not the absolute control and use of property.*”

In summary, and as intended in this booklet, the United States is the trustee for the federal territorial and public land trust, territorial and public lands constitute the body or “*corpus*” of this federal trust, and the states are the intended beneficiaries of this trust. The benefit to the respective states of the full and complete execution of this trust is the full and complete exercise of state sovereignty and jurisdiction over all of the lands within their borders in a manner equivalent to that of the original states.

The respective stipulated and intended meanings of the terms above are not inconsistent with the opinion of the U.S. Supreme Court:

“Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.” Shively v. Bowlby, 152 U.S. 1, 1894.

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“Current judicial opinion as to the meaning of the Property Clause is contrary to the historical record, contrary to the plain meaning of the constitutional text, and destructive of the structure of dual sovereignty as conceived by the Framers and ratified by the states.”

—Bill Howell, author

INTRODUCTION

On April 25, 1787, the Continental Congress received a report from its “Committee on [the land ordinance of 1785 for surveying and selling] *the Western territory.*” The Committee’s report stated with alarm that “*the efforts of the people towards ... extinguishment [of the national debt arising out of the American Revolution], fall far short of paying the interest and of consequence the public burthens [debt burdens] must be daily encreasing [sic].*”

However, by this date, Congress had also received cessions of land from New York, Virginia, Massachusetts, Connecticut, and South Carolina. These land cessions were made for two purposes. First, these lands were to be divided into new states with the “*same rights of sovereignty, freedom and independence*” as the original states. Second, “*These lands have been ceded to, and accepted by the United States as a fund for the common relief [from the national debt], to be faithfully disposed of for that purpose.*”

By the year 1787 it became clear to Congress that there was need to expedite sales of federal territorial lands. Trespassers were entering and taking up tracts as their own. Congress detailed troops to evict these trespassers but, due to a lack of funds, the number of troops was declining while the number of trespassers was increasing. In the words of the Committee,

“Any considerable delay in disposing of the land in the territory would very probably be attended with the entire loss of that land. ... The numbers [of trespassers] disposed to make these encroachments are manifestly encreasing [sic], and it appears... that the Troops in the service of the United States are more likely

to be reduced than increased in number. From these circumstances ... the loss of the lands is seriously to be apprehended, unless early measures are pursued for Vesting a better kind of people with rights there.” Report of the Committee on ordinance for disposition of Western territory, “*Journals of the Continental Congress,*” April 25, 1787, p. 239.

On July 13, 1787, Congress responded to the Committee’s recommendation that some measure “*for Vesting a better kind of people with rights*” in the territorial lands be enacted by enacting the Northwest Ordinance. Two days later, Richard Henry Lee sent a copy of the Ordinance to George Washington with a letter affirming that the purpose of the Ordinance is to facilitate disposal of the federal territorial lands:

“I have the honor to enclose to you an Ordinance that we have just passed in Congress for establishing a temporary government beyond the Ohio, as a measure preparatory to the sale of the Lands. It seemed necessary, for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined.” Richard Henry Lee to George Washington, July 15, 1787. *Letters of Delegates to Congress*, vol. 24, p. 357

The Northwest Ordinance **was incorporated into and made a part of the Constitution by Article VI of that instrument**, commonly referred to as the Debts and Engagements Clause. By this clause, “*All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.*” **Through a succession of congressional acts,**

the Ordinance, or its core principles, was extended to every federal territory as each of them was acquired and established by the United States.

The historical record is clear. The Northwest Ordinance was adopted as a means of facilitating disposal of the federal territorial lands. The Ordinance accomplished this by outlining private property rights within the territories in its second section and by establishing “*temporary*” but “*strong toned*” local governments within the territories to secure those rights. However, in the United States Supreme Court case *Sere v. Pitot*, 10 U.S. 332 (1810), Chief Justice John Marshall attributed federal authority to establish local governments within federal territories not to the Ordinance but to either the treaty power of Congress or to congressional authority under Article IV, sec. 3, clause 2 of the Constitution, otherwise known as the Property Clause.

Sere v. Pitot arose within the Territory of Orleans, precursor to the State of Louisiana. Why did Chief Justice Marshall attribute congressional authority to establish a local government in this and every other federal territory to either the treaty power or to the Property Clause and not to the Northwest Ordinance? Perhaps we will never know. What we do know is that Marshall’s avoidance of the existence and purpose of the Ordinance has resulted in the United States retaining ownership and jurisdiction over some thirty percent of the nation’s land mass.

It is also clear from the historical record that the Framers did not intend that this federal government would be master over an empire of land, and for good reason. As long as former territorial lands within the states are held under federal title and governance as “*public lands*,” **these states are denied their constitutional**

claim to equality of sovereignty with the original states and, concurrently, the federal government is exercising a political power within the states, in the form of local municipal governance, which is not authorized under the Constitution in the absence of express state consent.

“The Northwest Ordinance was incorporated into and made a part of the Constitution by Article VI of that instrument, commonly referred to as the Debts and Engagement Clause”

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PREFACE

A “*linchpin*,” according to Webster’s Encyclopedic Dictionary, is “*something essential upon which everything else depends.*” The Northwest Ordinance of July 13, 1787, was just one measure adopted by the United States Congress under the Articles of Confederation for the purpose of addressing its trust responsibility for dealing with federal territorial lands. The Ordinance was not necessarily intended by this Congress to be the *single* measure upon which the federal trust would depend. Each of the individual measures comprising the congressional response to its territorial land trust plays a role in its proper execution. However, it is to be demonstrated here that the Ordinance is at the center of circumstances that have given rise to divergent and mutually exclusive interpretations of this trust by the U.S. Supreme Court. For this reason, the Ordinance has become the linchpin upon which *correct* interpretation of the federal trust depends.

Divergent interpretations of the federal trust with respect to federal territorial lands are rooted in “*contrary*” interpretations of the Property Clause, located in Article IV, section 3, clause 2

of the United States Constitution. The Property Clause, in its entirety, states that,

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;” Art. IV, sec. 3, cl. 2, the Property Clause.

“*Contrariety*” in judicial interpretation of the Property Clause was acknowledged and described by the Court as follows:

“I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories.” Downes v. Bidwell, 182 U.S. 244 (1901).

To discover at what point in the history of the Court that “*contrariety*” was introduced into judicial interpretation of the Property Clause, and to determine which of the two contrary interpretations “*on the subject of the meaning of the clause*” is consistent with the constitutional text and original intent, some minimal and chronological reference to this nation’s formative history is warranted. Brief notice will be taken also of the adverse consequences of those decisions which prove to be contrary to both text and intent.

DECLARATION OF INDEPENDENCE - July 4, 1776

The original thirteen American colonies declared their independence from rule by the British monarch in the following unequivocal terms:

“[T]hese United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES...” (emphasis in original)

Upon this declaration, each state became a sovereign nation capable of coining money, entering into treaties, declaring war, and all the other things that independent nation states might do.¹ Critical to the purpose of this paper is the fact that each of these new and independently sovereign states had authority to exercise complete and undiminished *sovereignty and jurisdiction* over *all* of the territory within its declared limits.²

STATE CLAIMS TO “UNAPPROPRIATED” FORMER BRITISH “CROWN LANDS”

Prior to the Declaration of Independence, the British monarch claimed vast lands called *Crown lands* lying west of the Appalachian mountains to the Mississippi River, and from the Canadian border in the north to the northern border of Spanish Florida in the south. (Fig. 1)

At the outset of the American Revolution, seven of the original states asserted sovereign claims to portions of these unappropriated former Crown lands. In many instances, these asserted claims overlapped. Bitter contention existed between the states over these conflicting claims. This situation existed

at a time when the Continental Congress was struggling to hold the young American union together for the sake of successfully prosecuting the Revolution. We will revisit this contentious struggle between the states momentarily.



Figure 1 Former British Crown lands and state cessions in darker yellow (map from Foner)

ARTICLES OF CONFEDERATION

The Articles of Confederation was approved by the Continental Congress on November 15, 1777. Between July 9, 1778, and May 5, 1779, twelve of the thirteen original American states signed the Articles. Maryland withheld its signature out of concern stemming from the claims to unappropriated former Crown lands being asserted by seven states. Maryland, as a small seaboard state, had no claim to these unappropriated lands. Maryland argued that states making these claims would enjoy

disproportionate wealth and population as a consequence of vast land holdings. As a result of this expected disproportionate wealth and population, Maryland reasoned that the larger states would eventually dominate the affairs of any confederation, and small states like itself would be proportionately diminished as to their influence in these affairs.³ Resolution of this “standoff” between Maryland and the other states in the Union will be accomplished at a future date. At this juncture it is necessary only to note that, under the Articles of Confederation, absolute protection for state territorial sovereignty was explicitly written into Articles II and IX.

Article II reads as follows:

“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” Article II, Articles of Confederation.

Article IX reads, in part, as follows:

“... no State shall be deprived of territory for the benefit of the United States.” Article IX, Articles of Confederation.

THE RESOLUTION OF CONGRESS OF OCTOBER 10, 1780 - RESOLVING THE “CROWN LAND” CONTROVERSY

To resolve the divisive issue of state claims to unappropriated former Crown lands, Congress adopted the Resolution of October 10, 1780.⁴ With this resolution, Congress made five solemn promises that it would fulfill if the land claiming states would voluntarily cede “portions” of their claims to it. Unappropriated lands ceded by the states to Congress would become the first

federal territories. **It is important to the purpose of this paper to note that this Resolution of 1780 is *the origin and the totality of the federal territorial and public land trust. All that follows are means to its fulfillment.*** The five congressional promises in the Resolution of 1780 are summarized as follows:

1. Ceded lands shall “... *be settled and formed into distinct republican states ...*”;
2. The States thus formed “... *shall become members of the federal union ...*”;
3. New States established out of territorial lands shall “*have the same rights of sovereignty, freedom and independence, as the other states*” (i.e. equal footing);
4. Ceded lands “*shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union...*” and;
5. Ceded lands “*shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled...*”

Once Congress has admitted a new state into the Union, promises 1 through 3 in the Resolution of 1780, as outlined above, will have been fulfilled with respect to it. However, within new states established out of federal territory, a certain amount of former federal territorial land invariably remains pending disposal. Accordingly, promises 4 and 5 are expected to be fulfilled, not immediately but within a reasonable, but unspecified, period of time following the advent of statehood. The inclusion of former federal territorial land within the borders of new states does not absolve Congress of its self-appointed duty to dispose of it. Former federal territorial lands within new states remain subject to disposal though they may now be referred to as “*public lands.*”

Under the trust established by Congress with its Resolution of 1780, it is noted that there is *no allowance* for indefinite retention of territorial or public lands under federal title; there is *no allowance* for secondary designations or reservations of territorial or public lands for national purposes; and, there is *no allowance* for federal municipal governance of territorial or public lands. Note also that the Resolution provides for disposal of ceded lands **not** by sovereign legislation, but by the lesser and common **proprietary** “regulations.”⁶

From the discussion of the Resolution of 1780 above, the following observations are noted:

1. Congress promised that new states would be established out of federal territories and that these states shall “*have the same rights of sovereignty, freedom and independence, as the other states,*” subsequently termed “*equal footing.*”
2. Congress burdened itself with the duty to dispose of all territorial lands and to do so by administrative regulation, not by sovereign legislation.

UNION COMPLETED - MARYLAND SIGNS THE ARTICLES OF CONFEDERATION

Apparently confident that the divisive issue of state claims to unappropriated Crown lands would be settled favorably to its interests, Maryland signed the Articles of Confederation on February 2, 1781, bringing that instrument into full force and effect as the first American constitution.

Maryland is due appreciative recognition for having withheld its signature on the Articles of Confederation. Maryland's insistence upon a general parity of political power among the states forced Congress to articulate a policy and course of action with respect to federal territorial lands that gave rise to more "*free and independent*" states and, at the same time, denied to the United States the opportunity for empire.

STATE LAND GRANTS TO THE UNITED STATES BY TERMS OF "*SOLEMN COMPACT*"

In response to the Resolution of Congress of October 10, 1780, and over a period of time extending from 1780 to 1802, the seven land claiming states did cede *portions* of their unappropriated land claims to Congress. These state land cessions were made with instruments referred to in history as *solemn compacts*. These instruments include within their text a reiteration of the promises made by Congress in its 1780 resolution. Upon their acceptance by Congress, the cession instruments became bi-lateral compacts that would irrevocably *limit* and *direct* the course of congressional action with respect to federal territorial lands:

"It was presently observed that the terms upon which lands had been ceded to the United States did not leave it in the power of Congress to dispose of them for any purpose but for paying the debts of the public by a full and fair sale of all the ceded lands." Richard Henry Lee to George Washington, February 27, 1785. *Letters of Delegates to Congress*, Vol. 22, p. 224.

The credentials of Richard Henry Lee to speak to the force and effect of the terms of the *solemn compacts* between the states

and the United States are unimpeachable.⁷ But Lee is not the only authoritative voice in history to speak to the explicit and

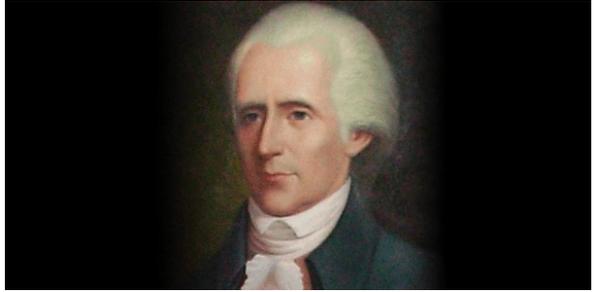


Figure 2 Richard Henry Lee

immutable nature of these terms. President Jackson also recognized that these compacts bound Congress to “*a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations*”:

“These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the constitution, and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them [territorial lands] by ties as strong as can be invented to secure the faith of nations.”

President Jackson,
Veto of the Land Bill,
December 5, 1835.

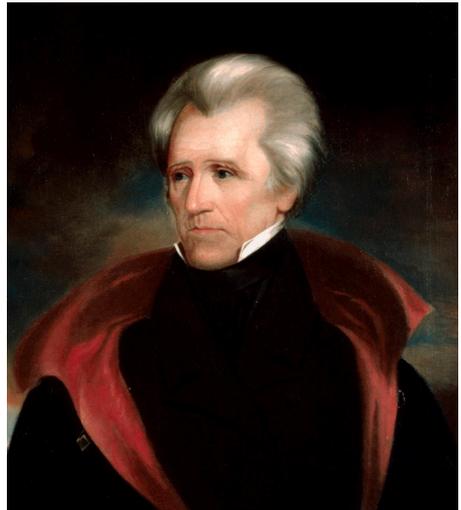


Figure 3 Andrew Jackson

The object of the Resolution of 1780 and the *solemn compacts* of land cession inspired by it was recognized in plain terms by the Court in *Pollard v. Hagan*, 44 U.S. 212 (1845):

“The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.”
Pollard v. Hagan, 44 U.S. 212 (1845).

Note that Pollard refers to the power of the United States over federal territorial lands as being a power *“as property.”* Without further elaboration, Pollard is recognizing that, with respect to federal territorial and public land, the United States is given a **temporary role as a common proprietor** over *“property”* as opposed to the role of a sovereign municipal government over it. This interpretation is consistent with the historical record that precedes ratification of the Constitution and also with the plain text of the Article IV Property Clause as will be demonstrated momentarily.

CESSION OF THE NORTHWEST TERRITORY BY THE STATE OF VIRGINIA

After some to-and-fro between itself and Congress, the State of Virginia issued a land cession instrument to Congress on December 20, 1783. Congress took action to accept Virginia’s cession on March 1, 1784. By this generous cession, executed for the sake of preserving the Union, Virginia gave up what is termed the Northwest Territory.



Figure 4: Northwest Territory ceded by Virginia

THE NORTHWEST ORDINANCE OF JULY 13, 1787

(The Northwest Ordinance is included in its entirety at the end of this paper.)

The official name of what is commonly referred to as the Northwest Ordinance is *An Ordinance for the Government of the Territory of the United States North-West of the River Ohio*. To fully understand the role of this ordinance within the context of the larger territorial system, a brief digression is warranted.

On April 2, 1784, and in response to congressional acceptance of Virginia's cession of the Northwest Territory on March 1, 1784, Congress passed the Land Ordinance of 1784 with Thomas Jefferson as primary author. This farsighted ordinance provided, in part, that new states established out of federal territorial lands would remain forever a part of the United States of America; that

new states would assume their apportionment of the federal debts; that governments established by the inhabitants of new states would be republican in form; that new states would be admitted on an “*equal footing*” with the original states⁸; and “*That they [new states] in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled; nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona fide purchasers.*” This act did not foresee the need for territorial governments and it did not provide for them. No new states were admitted into the Union under this act.

On May 20, 1785, Congress passed *An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory*. This ordinance established the basis for the Public Land Survey System. This ordinance was intended as a means of putting the Ordinance of 1784 into operation by providing a mechanism for subdividing, selling, and settling the land. By this act, the federal territorial lands were to be systematically surveyed into square townships, 6 miles on a side. Each township was to be further divided into thirty-six sections of 1 square mile or 640 acres. These sections could then be subdivided for resale by settlers and land speculators.

Between 1785 and 1787, Congress became increasingly concerned that trespassers were moving into the federal territories west of the Allegheny mountains and taking up land.⁹ In addition, Congress was being petitioned by private parties for permission to purchase large tracts of territorial land.¹⁰ Faced with these concerns, in addition to concern over payment of Revolutionary War debts and interest thereon, Congress was anxious to proceed with land sales. But there was yet another unaddressed

problem. There was no means of providing security for private property rights in the territories. The territories were beyond the boundaries of the states and, therefore, beyond the reach of their laws.¹¹

The Northwest Ordinance was passed by Congress on July 13, 1787, to establish a government in the Northwest Territory and to provide security there for “*the rights of property.*” For these reasons, the Ordinance has been recognized as “*a measure preparatory to the sale of the Lands*” comprising that territory.¹² In Section 2, the Ordinance prescribes in detail the property rights of territorial inhabitants including rights of conveyance and bequest.

After providing for the security of private property rights under Section 2, the Ordinance then sets forth the structure that will be followed for the establishment of a territorial government. In Sections 3 and 4, the Ordinance provides for a presidentially nominated and congressionally confirmed governor and secretary of state for the territory. Sections 5 through 8 outline certain functions of the governor. Sections 9 through 13 detail the procedure for seating and administering a “*territorial assembly*” which is the precursor to a state legislature. **Significantly, the Ordinance announces three times that this federally supervised territorial government is to be “*temporary*” pending admission of the territory into the Union as a new state, or states.**¹³

The Northwest Ordinance also sets forth six (6) Articles which “*shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent.*” With these

six Articles, the Ordinance establishes a general form for all future state enabling act compacts between the people of given territories and the United States.¹⁴

In sum, the Northwest Ordinance prepares the federal territorial lands for disposal by securing private property rights, directs the structure of temporary, federally supervised, local territorial governments, and sets down a general pathway to statehood for federal territorial lands.

THE CONSTITUTIONAL CONVENTION MAY 25 to SEPTEMBER 17, 1787

The Constitutional Convention convened in Philadelphia on May 25, 1787. On August 18th, it was proposed by James Madison that the convention take up a list of issues including that of the “*unappropriated lands*” that had been ceded to Congress, and also such additional lands as may be subsequently ceded. On this date “*Mr. MADISON submitted in order to be referred to the Committee of detail the following powers as proper to be added to those of the General Legislature - ‘To dispose of the unappropriated lands of the United States.’*” Madison, *Notes on the Debates in the Federal Convention*, August 18, 1787.

Debate on the matter of “*disposing*” of the “*unappropriated*” federal territorial lands within the constitutional text came to a head on August 30th. On this date, Mr. Williamson of North Carolina stated that “*He was for doing nothing in the constitution in the present case, and for leaving the whole matter in Statu quo.*”¹⁵ Immediately thereafter, Mr. Wilson of Pennsylvania stated that “*He should have no objection to leaving the case of new States as heretofore.*” The “*Statu quo*” that had been established “*heretofore*”

by Congress could only be the promises made by Congress in its Resolution of 1780, which promises were incorporated into the “*solemn compacts*” issued by the land claiming states and accepted by Congress.

After a series of failed motions, a successful motion was made by Gouverneur Morris as follows:

“The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States;” Gouverneur Morris of Pennsylvania. August 30, 1787. Madison, *Notes on the Debates in the Federal Convention*.

This motion by Morris, which became the text of the constitutional Property Clause, was accepted by the Convention with Maryland alone dissenting. Since Mr. Williamson and Mr. Williams voted their states in favor of Morris’ motion, it can be fairly concluded that the motion was understood by them to preserve the “*Statu quo*” that had been established “*heretofore.*” Moreover, nine attendees of the Convention had been members of Congress on October 10, 1780.¹⁶ These men were, therefore, parties to passage of the Resolution of that date. None of these men voted against Morris’s motion for, as the U.S. Supreme Court has said, “*Men do not use words to defeat their purposes.*”¹⁷ Morris’s motion must have been understood by Convention delegates as being wholly consistent with the terms of the Resolution of 1780 and the *solemn compacts* of land cession that were inspired by it.

From the discussion immediately above, it may be fairly concluded that the text of the Property Clause was understood to be crafted for the singular purpose of delegating to Congress the

common, proprietary powers it would need for use *within newly admitted states*¹⁸ to fulfill its single remaining duty under the *solemn compacts*. There was *no need* to include a governmental authority within the text of Morris' motion. Private property rights are protected within the states by state legislatures and state law. **Within the new states, all that remains for Congress to do under terms of the trust established by the Resolution of 1780 and the *solemn compacts* of land cession is to dispose of the territorial lands.**

It is critical, at this juncture, to take further note of two features of the Property Clause:

First: The text of the Property Clause does not include the words, nor does it include the slightest intimation, of sovereign *governmental* power. The *making of regulations* is an action that is within the capacity of common proprietors. **One need not be an elected governmental official to adopt regulations over that for which one has the right.** Similarly, the act of *disposal* is not a sovereign act but merely the conveyance of title.¹⁹ With respect to the words chosen to formulate the Property Clause, we must accept that the Framers fully understood their meaning and that these were chosen not by chance but with specific intent.²⁰

Second: The original states, as previously discussed, jealously retained complete and undiminished territorial sovereignty under the Articles of Confederation and they relinquished none of this authority under the national Constitution.²¹ Under the Equal Footing Doctrine, new states established out of federal territorial lands are entitled to the same measure of territorial sovereignty as the original states.²² If the Property Clause were to authorize a *federal municipal governmental authority* over former federal

territorial lands captured within the new states as public lands, this federal authority would utterly subordinate state municipal authority over those lands because the constitutional Supremacy Clause would come into play. States with public lands within their borders would, therefore, be denied their constitutional claim to equality of sovereignty with the original states. For this reason, the possibility of a federal municipal governmental power being exercised over public lands within the states was recognized as *constitutionally objectionable*.²³ It is for this reason that **we find not even a hint of sovereign governmental authority in the Property Clause text.**

On September 17, 1787, George Washington, presiding president of the Constitutional Convention, conveyed the draft Constitution for the United States of America to Congress. Congress then printed and conveyed the draft to the several states for their consideration and ratification. During the course of the state ratification conventions, James Madison, Alexander Hamilton, and John Jay wrote the *Federalist Papers*. These eighty-five papers were written between October 1787 and August 1788. They were published in New York City news papers. The authors' intent was to convince citizens of the city that the draft Constitution was worthy of their approval. The citizens relied upon the representations and assurances of these Framers when they did, in fact, approve the draft Constitution. Among the assurances given to the people was that of James Madison wherein he assured the people that,

“The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation.” Madison. *Federalist Paper* No. 40, January 18, 1788.

The truth of Madison's assurance to the people can be demonstrated in the "*expansion*" of that principle in article IX of the Articles of Confederation whereby "... *no State shall be deprived of territory for the benefit of the United States.*" This principle of inviolable state territory is expanded upon by the Constitution under Article I, sec. 8, clause 17, the Enclave Clause. By this clause, Congress is authorized to purchase parcels within a state for federal purposes but only "...*by the Consent of the Legislature of the State in which the Same shall be.*" With this proviso, the primacy of state territorial sovereignty was intended to be preserved while, at the same time, the expanded principle provides a mechanism whereby national needs for parcels to serve legitimate federal purposes may be met.

In ratifying or adopting the draft Constitution, the people relied upon the Framers' representations as being truthful.²⁴ To place an interpretation upon their words today that is not in keeping with their original intent is, therefore, to perpetrate a fraud upon the people.²⁵

From the discussion of the Constitutional Convention above, the following observations and conclusion are noted as being critical to the purpose of this paper:

1. With respect to federal territorial lands, the Constitutional Convention intended that the new Constitution not alter the "*statu quo*" with respect to the terms of *solemn compact* that had been agreed to "*heretofore*" between the United States and the several land ceding states.
2. The principles set down in the Articles of Confederation, most particularly the principle of a "*residuary and*

*inviolable*²⁶ state territorial sovereignty, was maintained under the Constitution.

3. The Property Clause delegates to Congress only the proprietary powers of disposal and the making of such “*rules and regulations*” as are “*needful*” to that purpose.

4. A federal municipal power under the Property Clause would be *constitutionally objectionable* because such a power would subordinate state territorial sovereignty under the Supremacy Clause and, thereby, deny the affected state that equality of sovereignty with the original states to which it is constitutionally entitled upon the instant of its statehood under the Equal Footing Doctrine. In other words, **the Equal Footing Doctrine is a specific bar against a federal municipal governmental power under the Property Clause.** Federal municipal governance within a state is impermissible in the absence of express state consent.²⁷

RENDERING THE NORTHWEST ORDINANCE “CONSTITUTIONAL”

At the time that the Northwest Ordinance was passed, Congress was functioning under the Articles of Confederation. Under the limitations of the Articles, Congress had no authority to vest in itself a power to establish local governments in the federal territories and no expressed authority to dispose of the federal territorial lands. It is for this reason that Madison, in *Federalist Paper* No. 38, dated January 15, 1788, referred to Congress’s adoption of the Northwest Ordinance as an “*excrecent*” exercise of power, meaning an exercise of power “*without the least colour*”

of constitutional authority.” And yet, Madison stated as well that he did not mean to “*throw censure on the measures which have been pursued by Congress*” because he was “*sensible*” that it could not have done otherwise under the circumstances of the time when there was no national constitution. He added that “*The public interest ... imposed upon them the task of overleaping their constitutional limits*” under the Articles of Confederation.

Madison used the occasion of the passage of the Northwest Ordinance, just over six months earlier, to put forth an argument in support of the draft Constitution with its enumeration of specific congressional powers. Madison posed the following question:

“But is not the fact [of this excrescent act of Congress] an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects?” Madison, *Federalist Paper No. 38*.

Madison’s question suggests, correctly, that the draft Constitution holds within its provisions the remedy for the “*excrescence*” of the congressional act which produced the Northwest Ordinance. The remedy is to be found primarily in the Debts and Engagements Clause of Article VI but also in the Property Clause of Article IV.

By the Debts and Engagements Clause, “*All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.*” Hence, **by this clause, the Northwest Ordinance, as a prior existing “engagement” among the states, was rendered constitutional and no**

longer “excrecent.”²⁸ Congress could now, with constitutional authority, secure property rights and establish “temporary” local governments within the federal territories.²⁹

The absence of disposal authority under the Articles of Confederation was remedied by the Property Clause. Pursuant to this clause, Congress is constitutionally authorized to fulfill its trust duty under the Resolution of October 10, 1780, and the *solemn compacts* of land cession issued by the states, to dispose of the territorial and public lands by such “*rules and regulations*” as it deems “*needful.*”³⁰

EXTENDING THE PRINCIPLES AND BENEFITS
OF THE NORTHWEST ORDINANCE
TO EVERY FEDERAL TERRITORY

The principles and benefits afforded to the inhabitants of the Northwest Territory under the Northwest Ordinance, as well as the performance requirements that Congress placed upon itself under that document, were extended through a succession of Congressional acts to EVERY federal territory subsequently acquired by the United States.

In *United States Statutes at Large*, at 1 Stat. 123, chap. 14 (May 26, 1790), the Ordinance was extended to the Southwest Territory which became the State of Tennessee. By 1 Stat. 549, chap. 28 (April 7, 1798), the Ordinance was extended to the Mississippi Territory which became the States of Mississippi and Alabama. By 2 Stat. 322, chap. 23 (March 2, 1805), the Ordinance was extended to the Territory of Orleans which became the State of Louisiana. By this latter statute, the precedent was established whereby the principles

of the Ordinance extend to every territory obtained by the United States from foreign nations including those from France (Louisiana Purchase), Spain (Florida Treaty), Mexico (Mexican Cession and purchase), and Britain (Oregon Treaty).

An argument has been advanced which holds that states established out of territorial lands acquired by the United States from foreign powers differ from other states which were established out of lands ceded to the United States by one of the original states. It is said that the former **do not** possess an “*independent*” claim to sovereignty while the latter **do** possess such a claim. The latter possess such a claim, it is said, because their territory was once associated with an original state which won its sovereignty through revolution against imperialism.³¹ However, it is impermissible to distinguish the sovereignty of one state from that of another based upon the source of the territories from which they were established. **The claim of each state to independent territorial sovereignty is the same and the right of all.** To argue otherwise is to make an “*invidious distinction*” between the states.³²

Upon the attainment of statehood for a given federal territory, the sovereignty and jurisdiction of the new state extends throughout its territory (Ref. endnote 2). The new state’s legislature, operating under a state constitution and a republican form of government, becomes the protector of private property rights. **Under its public land trust, all that remains for Congress to constitutionally do within the new state is to honor its duty to dispose of the former territorial lands, now referred to as “*public lands,*” remaining within the state.** Here is the Court speaking to the status of the United States in relation to the “*public land*” remaining within a given state, in this case

Alabama: “*Nothing remained to the [sovereign and jurisdictional] United States, according to the terms of the [Alabama enabling act compact with the United States], but the public lands.*”³³ In other words, with respect to the public lands of the new State of Alabama, only a proprietary authority, as opposed to a sovereign and supreme governmental authority, remains of the United States, and this for the single remaining purpose of the federal land trust, which is to dispose of these residual, former territorial lands.

Four conclusions may be drawn from the formative history and text of the Northwest Ordinance:

First: It is the Northwest Ordinance, not the Property Clause, that authorizes Congress to establish “*temporary*” LOCAL GOVERNMENTS within the federal territories.

Second: Congress does not govern territories. Territories are governed by *temporary* LOCAL GOVERNMENTS that function under CONGRESSIONAL SUPERVISION:

“Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists.”
Pollard v. Hagan, 44 U.S. 212 (1845).

Third: The Northwest Ordinance was crafted for the purpose of preparing federal territorial lands for disposal by providing legal

security for private property rights. Principles of the Northwest Ordinance were extended by Congress to every federal territory regardless of the source from which, or the means by which, it may have come into the possession of the United States:

*“Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, **the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.**”* Shively v. Bowlby, 152 U.S. 1 (1894). (emphasis added)

Fourth: Territorial governments established under the Ordinance are “*temporary*” pending admission of the territories into the Union as new states. **It is not local governance that is being excluded from the interior of new states. That which is excluded as “temporary” is every pretense to an independent federal authority to engage in municipal governance within new states.**

SUMMARY OF HISTORICAL FACTS

It’s not particularly difficult to determine the source and the object of the federal trust with respect to federal territorial and public lands. The federal territorial system is rooted in the Resolution of Congress of October 10, 1780. It was codified by way of constitutional ratification on June 21, 1788, with the signature of the ninth state, New Hampshire.³⁴ This is a period of only seven years and six months. All that is to be known about the origin, the substance, and the object of this trust lies within

this time frame. In sum, the federal trust with respect to all federal territorial lands, including all former federal territorial lands situated within the confines of states as public lands, can be said to consist of just two elements:

1. **DIVIDE** the territories into tracts of suitable size and admit these tracts into the Union of states, under certain terms, as new states which possess the *“the same rights of sovereignty, freedom and independence, as the other states,”* i.e., equality with the original states as to political rights and as to sovereignty. (Ref. endnote 22)
2. **DISPOSE** of the territorial and public land by *“all needful rules and regulations.”*

The federal trust respecting territorial and public lands is not complex and it is not expansive. At its root, this solemn trust is extraordinarily simple. To repeat from above, Richard Henry Lee spoke truly when he said,

“It was presently observed that the terms upon which lands had been ceded to the United States did not leave it in the power of Congress to dispose of them for any purpose but for paying the debts of the public by a full and fair sale of all the ceded lands.” Richard Henry Lee to George Washington, February 27, 1785. *Letters of Delegates to Congress*, vol 22, p. 224.

THE ORIGIN OF “CONTRARIETY” WITH RESPECT TO JUDICIAL CONSTRUCTION OF THE PROPERTY CLAUSE AND ITS AFTERMATH

The most recent Court case expounding on the source and nature of the federal trust with respect to territorial and public lands is

that of *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Much can be said about how this case misconstrues this trust. However, for the sake of brevity, just one line from dicta in the case will suffice to illustrate the “*contrariety*” that exists in judicial interpretation of the Property Clause which has, in turn, lead to confusion over the federal trust for territorial and public lands. Without equivocation, *Kleppe* states directly that “*It is the Property Clause, ..., that provides the basis for governing the Territories of the United States.*” For authority to make this statement, *Kleppe* cites to a list of six Court cases beginning with *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) and ending with *Sere v. Pitot*, 10 U.S. 332 (1810). It is the *Sere v. Pitot* case which arose out of the territory of Orleans (precursor to the modern State of Louisiana) that appears to be the origin of “*contrariety*” in judicial construction of the Property Clause. In *Sere, v. Pitot*, Chief Justice John Marshall (1755 - 1835) stated that,

“The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory [the treaty power]. Could this position be contested, the constitution of the United States declares that ‘congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States’ [the Property Clause]. Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans.” *Sere v. Pitot*, 10 U.S. 332 (1810).

Chief Justice Marshall was a learned man but he was not without his prejudices.³⁵ Why he did not acknowledge that federal authority to establish governments within federal territories derives solely from the Northwest Ordinance is not known. Did

he not know that by 2 Stat. 322, chap. 23 (March 2, 1805), five years before *Sere v. Pitot* was decided, Congress had extended the Northwest Ordinance to the territory of Orleans? The words of 2 Stat. 322 are clear on this point:

“An act further providing for the government of the Territory of Orleans” --

“Sec. 2. And be it further enacted that the said ordinance of Congress [the ordinance of Congress, made on the thirteenth day of July, one thousand seven hundred and eighty-seven], as relates to the organization of a general assembly, and prescribes the powers thereof, shall, from and after the fourth day of July next, be in force in the said territory of Orleans.”

2 Stat. 322 (1805).

As a consequence of *Sere v. Pitot* and its progeny, up to and including *Kleppe v. New Mexico*, *constitutionally objectionable* federal municipal governmental jurisdiction has entered into the states upon their public lands because the Constitution with its Property Clause, *as interpreted by Marshall in Sere v. Pitot and its progeny*, is operational within the states. In *Kleppe*, this federal municipal jurisdiction is considered to be “*complete*,” “*without limitation*,” including “*police power*,” and “*analogous*” to the legislative power of the states themselves. It is obvious that such a power as this completely subordinates state municipal powers over public lands under the Supremacy Clause; and insofar as state municipal power is subordinated and rendered unequal to that undiminished territorial jurisdiction jealously retained by the original states over all of their territory, including over their retained and unappropriated former Crown lands, the states affected are denied their constitutional claim to equality of sovereignty under the Equal Footing Doctrine.

Sere v. Pitot and its progeny have given judicial approval to what Justice Joseph Story (1779-1845) referred to as a “*constitutional objection*,” that objection being a federal municipal authority operating within the states without express state consent.³⁶ Justice Story saw fit to characterize such an instance as this in his *Commentaries on the Constitution of the United States*: “If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded [e.g. constitutional protection for ‘residuary and inviolable’ state territorial sovereignty], would it not now be a fraud upon the whole people to give a different construction to its powers [e.g., to construe the Property Clause power to dispose and make all needful rules and regulations as an unlimited power of supreme municipal governance]?”³⁷ (Also reference endnote 25.)

The question as to the source of *contrariety* in judicial interpretation of the constitutional Property Clause seems to be answered in the 1810 Sere v. Pitot decision wherein Chief Justice Marshall ignored the existence and purpose of the Northwest Ordinance. But the question raised in the Downes v. Bidwell case (p. 1) remains. Does the Property Clause pertain to “*property as such*” and, thereby, render Congress a mere proprietor over federal territorial and public lands for the common purpose of their disposal, or is this clause “*a general grant of power to govern territories*”? All evidence from the relevant historical record between 1780 and 1788 clearly supports the former opinion and provides no support whatever for the latter. Support for the latter is found only in subsequent and demonstrably incongruous judicial expositions.

CONCLUSION

Federal municipal jurisdiction over public lands within the states is a power not authorized under the Constitution. However, federal municipal jurisdiction over public lands within a given state may be authorized by mutual consent between that state and the United States. In the absence of mutual consent, exercise of this power by Congress is an affront to a nation which propounds reverence for law as one of its highest virtues, and its Constitution as its “*Supreme Law.*” The singular power delegated to Congress under the constitutional Property Clause is “*to dispose*” of federal territorial and public lands by “*all needful rules and regulations.*” By no means is this a delegation of power to legislate, much less an “*unlimited*” power to legislate. If there is an absence of limitation at all in this clause, it is in the broad discretion given to Congress to determine which rules and regulations are “*needful*” for the purpose of disposal.

As a delegation of common proprietary powers, it is undoubtedly purposeful that the Property Clause is found in the state’s article, Article IV, and not in the legislative article, Article I, of the Constitution. The currently prevailing judicial interpretation of federal power over territorial lands now situated within the states as public lands denies to these states that equality of sovereignty with the original states to which they are constitutionally entitled. Accordingly, this prevailing interpretation strikes a destructive blow against our federal structure of “*dual sovereignty*” as that structure was conceived by the Framers and ratified by the states. **This is our time. It is our duty to correct the error and restore, for the sake of the rule of law, the original design which remains as current law despite judicial opinion to the contrary.**

END

Northwest Ordinance; July 13, 1787

*An Ordinance for the government of the
Territory of the United States northwest of the
River Ohio.*

Section 1. Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec 2. Be it ordained by the authority aforesaid, That the estates, both of resident and nonresidents in the said territory, dying intestate, shall descent to, and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; and there shall in no case be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed

by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance, of property.

Sec. 3. Be it ordained by the authority aforesaid, That there shall be appointed from time to time by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1,000 acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings, every six months, to the Secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law

jurisdiction, and reside in the district, and have each therein a freehold estate in 500 acres of land while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but afterwards the Legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time as circumstances may require, to lay out the parts of the

district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or townships to represent them in the general assembly: Provided, That, for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty five; after which, the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; Provided, also, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The Legislative Council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the Council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the Governor shall appoint a time and place for them to meet together; and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the president of congress, and all other officers before the Governor. As soon as a legislature shall be formed in the district, the council and house assembled in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not voting during this temporary government.

Sec. 13. And, for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

Art. 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus , and of the trial

by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Art. 4. The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in

Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and, in no case, shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Art. 5. There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due North, to the territorial line between the United States and Canada; and, by the said

territorial line, to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line, drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided, however , and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

Art. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to

the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23rd of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty [sic] and independence the twelfth.

ENDNOTES

1. *“In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.”* Ware v. Hylton, 3 U.S. 199 (1796).

2. *“What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.”* U.S. v. Bevens, 16 U.S. 336 (1818).

3. Maryland explained its objection to the land claims being asserted by seven of the new American States with a single rhetorical question: *“Is it possible that those States who are ambitiously grasping at territories, to which, in our judgment, they have not the least shadow of exclusive right, will use with greater moderation the increase of wealth and power, derived from those territories, when acquired, than what they have displayed in their endeavors to acquire them?”* Journals of the Continental Congress, 1774 - 1789, vol. 14, May 21, 1779, p. 620.

4. The actual text of the resolution of Congress of October 10, 1780, in pertinent part, is as follows: *“Resolved, That*

the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: that each state which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively. ... “*That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them ...*” Journals of the Continental Congress, 1774-1789 Tuesday, October 10, 1780.

5. “*Most enduringly, the public lands have been defined as those lands subject to sale or other disposal under the general land laws.*” E. Baynard, Public Land Law and Procedure, 1.1, 2, 1986.

6. Congressional action providing for the disposal of territorial and public land “*savors somewhat of mere rules prescribed by an owner of property for its disposal.*” *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905). Disposal of property is “*not an act of sovereignty [sic], but a mere conveyance of title.*” *Fletcher v. Peck*, 10 U.S. 87 (1810).

7. Biography of Richard Henry Lee (1732 – 1794): Member 1st and 2nd Continental Congresses; authored the motion in Congress, dated June 7, 1776, for independence from Britain; signed the Declaration of Independence and Articles of Confederation; President of Congress of the Confederation Nov. 30, 1784 - Nov. 6, 1785; member of the U.S. Senate under the Constitution.

8. *“The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.” ... “The ‘equal footing’ clause has long been held to refer to political rights and to sovereignty. See Stearns v. Minnesota, 179 U.S. 223, 245.” United States v. Texas, 339 U.S. 707 (1950).*

9. *(I)t seems that either Congress must sell quickly, or possession will be so taken as to render doubtful this fine fund [land for sale] for extinguishing the public debt. It has been impossible to get a vote for more than seven hundred men to garrison all the posts to be fixed in the trans-Alleghanian country, from north to south; a number very inadequate, I fear, to the purpose of even suppressing illegal trespasses upon the western lands.” Richard Henry Lee to George Washington, April 18, 1785. Letters of Delegates to Congress, vol. 22, p. 345-346.*

10. *[W]e are considering an offer made to purchase 5 or 6 millions of Acres with pub. Securities. I hope we shall agree with the offer, but realy [sic] the difficulty is so great to get anything done, that it is not easy for the plainest propositions to succeed.” Richard Henry Lee to Francis Lightfoot Lee, July 14, 1787. Letters of Delegates to Congress, vol. 24, p. 354, n2.*

11. “[M]embers of the American confederacy only are the states contemplated in the Constitution.” *Downes v. Bidwell*, 182 U.S. 244 (1901), citing *Hepburn v. Ellzey*, 1805. “It can nowhere be inferred that the territories were considered a part of the United States.” *Shively v. Bowlby*, 152 U.S. 1 (1894). Also, ref. endnote 2.

12. “I have the honor to enclose to you an Ordinance that we have just passed in Congress for establishing a temporary government beyond the Ohio, as a measure preparatory to the sale of the Lands. It seemed necessary, for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined.” Richard Henry Lee to George Washington, July 15, 1787. *Letters of Delegates to Congress*, vol. 24, p. 357.

13. The Northwest Ordinance declares federally supervised territorial governments to be “*temporary*,” pending admission of the territory into the Union as a new state, three times including in sections 1, 7 and 12.

14. “[T]he Northwest Ordinance established the basic framework of the American territorial system.” Hall, Kermit L., ed. in chief (1992). *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, p. 600.

15. Madison, *Notes of Debates in the Federal Convention of 1787*, August 30, 1787.

16. Members of Continental Congress in 1780 and also of the Constitutional Convention of 1787:

Connecticut: Oliver Ellsworth, Roger Sherman
Georgia: William Few
Maryland: Daniel of St. Thomas Jenifer
Massachusetts: Elbridge Gerry
New Jersey: William C. Houston
Pennsylvania: George Clymer , Jared Ingersoll
Virginia: James Madison

17. *United States v. Classic*, 313 U.S. 299 (1941).

18. “(M)embers of the American confederacy only are the states contemplated in the Constitution.” *Downes v. Bidwell*, 182 U.S. 244 (1901), citing *Hepburn v. Ellzey*, 1805. “It can nowhere be inferred that the territories were considered a part of the United States.” *Shively v. Bowlby*, 152 U.S. 1 (1894).

19. “The sale itself was not a legislative act. It was not an act of sovereignty [sic], but a mere conveyance of title.” *Fletcher v. Peck*, 10 U.S. 87 (1810).

20. “To disregard such a deliberate choice of words and their natural meaning, would be a departure from the first principle of constitutional interpretation. ‘In expounding the Constitution of the United States,’ said Chief Justice Taney in *Holmes v. Jennison*, 14 U.S. 540, ‘every word must have its due force and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.’ ... Every word appears to have been weighed with the utmost deliberation and its force and effect to have been fully understood.” *Wright v. United States*, 302 U.S. 583 (1938).

21. *“Each (former colony) declared itself sovereign and independent, according to the limits of its territory.” “[T]he soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour.”* Harcourt v. Gaillard, 25 U.S. 523 (1827).

22. *“The requirement of equal footing was designed ... to create parity as respects political standing and sovereignty.”* United States v. Texas, 339 U.S. 707 (1950).

23. *“The power itself [of disposal and of making all needful rules and regulations under the Property Clause] was obviously proper, in order to escape from the constitutional objection already stated to the power of congress over the territory ceded to the United States under the confederation.”* Story J., *Commentaries on the Constitution of the United States* (1833). vol. III, Ch. XXXI, sec. 1317.

24. *“The people were assured by their most trusted statesmen ‘that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic,’ and ‘that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere.’”* Scott v. Sandford, 60 U.S. 393 (1856) referencing Madison, *Federalist Paper No. 39*. *“The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government is one of the plainest facts which emerges from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states.”* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

25. “[T]he people are entitled to rely upon the representations of the Founders and to repudiate them would constitute a fraud upon the people.” Berger, R. (1987). *Federalism - The Founders Design*, Norman and London, University of Oklahoma Press. p. 59, n57. “When any court violates the clean and unambiguous language of the Constitution, a fraud is perpetrated and no one is bound to obey it.” (See 16 Ma. Jur. 2d 177, 178) *State v. Sutton*, 63 Minn. 147, 65 NW 262, 30 L.R.A. 630 Am. St. 459.

26. The proposed Constitution leaves “... to the several States a residuary and inviolable sovereignty over all other objects.” Madison, *Federalist Paper* No. 39. Undiminished state territorial sovereignty and jurisdiction must be within this “residuary and inviolable sovereignty.” Territorial sovereignty is the actual definition of an American state. Ref. endnote 2.

27. “It rests with the state to determine the extent of territory over which the federal will exercise sovereign jurisdiction.” The Writings of George Washington from the Original Manuscript Sources, 1745-1799. John C. Fitzpatrick, Editor.--vol. 32, United States, Nov. 9, 1792.

28. “The sixth article of the Constitution declares, that ‘all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this Constitution as under the confederation.’ Thus this ordinance, the most solemn of all engagements, has become a part of the Constitution.” *Pollard v. Kibbe*, Jan. Term, (1840).

29. “By the constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire

dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition.” Shively v. Bowlby, 152 U.S. 1 (1894).

30. “[T]he importance of conferring on the new government regular powers [making needful rules and regulations] commensurate with the objects to be attained [disposal], and thus avoiding the alternatives of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely be perceived. That it was in fact perceived, is clearly shown by the Federalist (No. 38) where this very argument is made use of in commendation of the Constitution.” Scott v. Sandford, 60 U.S. 393, 15 L. Ed. 608 (1856).

31. In Cliff and Bertha Gardner v. U.S., 9th Circuit Court, #95-17042, October Term, 1997, the court distinguished the sovereignty of a new state established out of land ceded to the United States by an original state from the sovereignty of other new states established out of land acquired by the United States from a foreign power. Gardner attempted to rely upon Pollard v. Hagan (1845) to argue that Nevada was entitled to the same extent of territorial sovereignty as Alabama, the location of the Pollard case. Alabama enjoyed complete territorial sovereignty while 88% of the land in Nevada remains under federal municipal jurisdiction. The court denied Gardner’s reliance upon Pollard. The court responded that the State of Alabama was established out of the former western territory of Georgia. Georgia, the court observed, was one of the “*original thirteen states*” which won independence for itself in the Revolution. Consequently, by virtue of its territory having been formerly attached to an original State, the Court reasoned that the State of Alabama possesses an “independent claim to sovereignty.” Nevada, on the other hand,

has “no [such] *independent claim to sovereignty*” because “*the Federal government was the original owner of the land from which the state of Nevada was later carved.*”

32. *Pollard v. Hagan* 45 U.S. 212 (1845). Also, reference *Shively v. Bowlby*, p. 13.

33. “*When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession [i.e. disposal] and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands.*” *Pollard v. Hagan*, 44 U.S. 212 (1845).

34. Codification under the Constitution of the federal trust with respect to territorial and public lands is accomplished under two clauses. First, the Property Clause requires that these lands be disposed of and in the words of Chief Justice John Marshall, “*It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution.*” *McCulloch v. Maryland*, 17 U.S. 316 (1819). Second, the Admissions Clause provides that only “*states*” may be admitted into the Union as new members. By this clause, every new state must have the same jurisdictional authority as the original states. This requirement precludes the admission of any land that remains under federal municipal jurisdiction. In this sense, the Admissions Clause is the root of the Equal Footing Doctrine. In the words of the Court, “*The power is to admit ‘new*

States into this Union.” “This Union was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.” Coyle v. Smith, 221 U.S. 559 (1911).

35. It has been said that Chief Justice John Marshall had a “magisterial view” of the federal government. Hall, Kermit L., ed. in chief, (1992). *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 281.

36. Justice Joseph Story (September 18, 1779 – September 10, 1845) was an American lawyer and jurist who served on the Supreme Court of the United States from 1812 to 1845. Author of *Commentaries on the Constitution of the United States*, vol. 1-3. 1833.

37. Story, J. (1833). *Commentaries on the Constitution of the United States*. Littleton , CO., Fred B. Rothman & Co., vol. 2, Sec.1080 at 33. (Also, reference endnote No. 25)

“Linchpin” may well be the key to the legal case favoring each State’s constitutional right to govern the lands within their own borders. This eye-opening analysis demonstrates that the tenets of the Northwest Ordinance were extended by Congress to every federal territory, and it pinpoints where judicial interpretations of the Property Clause have gone astray.

—The Honorable Jennifer Fielder,
President & CEO American Lands Council



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